In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1205

EDWARD CHALE AND LEE J. CHRISTAKIS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the district court erred (1) in instructing the jury that proof of their actual knowledge that the victim of their assault was an F.B.I. agent was not required to constitute an offense under 18 U.S.C. 111 and (2) in excluding extrinsic evidence offered to impeach the credibility of a government witness.

Following a jury trial in the United States District Court for the Northern District of Indiana, petitioners were convicted of assaulting a federal officer while in the performance of his official duties, in violation of 18 U.S.C. 111. Both petitioners received six-month sentences, thirty days to be served in confinement, with the remainder of the sentence suspended. In addition, they were placed on probation for a period of three years and fined $3,000 (Pet. 4). The court of appeals affirmed in an un-

published order (Pet. App. A), and a petition for rehearing was denied on February 19, 1975 (Pet. App. B). The petition for a writ of certiorari was filed on March 24, 1975, and is therefore out of time under Rule 22(2) of the Rules of this Court. In any event, petitioners' contentions do not merit review.

The evidence at trial, as reviewed by the court below, showed that on August 1, 1973, Rick Seebauer, a deputy sheriff for Porter County, Indiana, entered the Golden Coin night club in Gary, Indiana, where he was accosted by an individual later identified as petitioner Chale's brother, who told him "that he wouldn't live to testify before the grand jury" (Pet. App. A 2).[1] Seebauer left the club and reported the threat to Special Agent Melchiori of the Federal Bureau of Investigation. Agent Melchiori subsequently returned to the club with Seebauer for the purpose of ascertaining the identity of the person who had uttered the threat. Melchiori approached Chale's brother, identified himself, and was attempting to follow him to an adjoining dining room when a group of people, including petitioners, stepped forward and stopped him. The encounter eventually led to an altercation in which Agent Melchiori was struck by petitioners and eventually knocked unconscious by a third individual (Pet. App. A 2).[2]

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[1]Seebauer had previously worked with the F.B.I. in an undercover capacity in investigating gambling activities in Gary, Indiana, and was to be a witness before a federal grand jury investigating gambling violations.

[2]There was conflicting evidence at trial relating to the above-described events. Petitioners contended that they did not strike Agent Melchiori. Petitioner Chale admitted initially "impeding" the agent's progress but testified that he ceased doing so after the agent identified himself (Pet. 6). However, petitioners do not here challenge the court of appeals' determination that there was sufficient evidence to support the jury's finding that they willfully assaulted Melchiori (Pet. App. A 3).

1. Petitioners tendered instructions to the trial court, requesting, in effect, that the jury be instructed that it was incumbent upon the government to prove that petitioners were aware of Agent Melchiori's status as a federal officer at the time they assaulted him (Pet. 8-9). The trial court refused those instructions, and charged the jury:

> In order for the Government to establish the offense charged * * * it is not necessary that the Government prove as a part of its case that the defendant had actual knowledge that the victim was an F.B.I. agent who was engaged in the performance of his official duties. [Court's Instruction No. 18.]

Petitioners' argument (Pet. 8-12) that this instruction was erroneous is without merit in light of this Court's recent decision in *United States* v. *Feola*, No. 73-1123, decided March 19, 1975. That case held that where, as here, the government proves a criminal intent to assault, it is immaterial whether the assailants knew that their victim was a federal officer: "All the statute [18 U.S.C. 111] requires is an intent to assault, not an intent to assault a federal officer" (slip op., p. 13).

In *Feola* the Court recognized that there may be circumstances in which ignorance of the official status of the person assaulted negates the existence of the *mens rea* required under 18 U.S.C. 111, such as where a plain-clothes officer's conduct might reasonably have been perceived by the defendant as the unlawful use of force against him or his property, thereby justifying a reasonable degree of resistance (slip op., p. 14). Petitioners cite cases involving such situations (Pet. 10-11), but such cases are inapposite to the situation here, where the agent was not acting in any manner that petitioners could have interpreted as constituting an unlawful show of force against themselves. Nor do petitioners allege that their actions were predicated upon such a belief.

2. During cross-examination of government witness Seebauer by defense counsel, Seebauer denied using or being addicted to marijuana or narcotic drugs. Petitioners proposed to call three witnesses for the purpose of testifying that Seebauer had smoked and distributed marijuana and had on one occasion smoked opium (Pet. 12-13). Petitioners contend (Pet. 12-16) that the trial court erred in excluding such testimony. The court of appeals properly rejected this claim (Pet. App. A 4-5), since specific acts of misconduct, other than conviction of a crime, offered to attack the credibility of a witness, may not be proven by extrinsic evidence.[3] See Rule 608(b), Federal Rules of Evidence (effective July 1, 1975). As the court of appeals pointed out (Pet. App. A5):

> [D]efendants receive no support from recent federal cases * * * that permit extrinsic evidence as to drug addiction to be introduced, because they did not attempt to show that Seebauer was a drug addict. Marijuana is a non-narcotic drug and a single instance of smoking opium would not prove addiction.

Contrary to petitioners' assertions (Pet. 13-15), the opinion below is not in conflict with decisions of other circuits. In *United States* v. *Fowler*, 465 F.2d 664 (C.A. D.C.), it was held that the trial court had unduly limited *cross-examination* as to a witness's use of narcotics. Petitioners admit that they were permitted unrestricted cross-examination as to Seebauer's alleged use of narcotics (Pet. 15). In *United States* v. *Kinnard*, 465 F.2d 566, 575 (C.A. D.C.) (Pet. 13-14), the same court held that "if

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[3]The same result follows if the proffer was an attempt to prove that Seebauer lied when he denied using, or being addicted to, marijuana or narcotics. "Extraneous misconduct of the witness (for which no conviction has been had) * * * is collateral and if denied on cross-examination cannot be proved to contradict." McCormick, *Evidence* §47, p. 102 (1954).

evidence is presented by the defense that a paid government informer is also an addict and under indictment for narcotics violations, this evidence must be presented to the jury along with the special cautionary instruction * * * " (footnote omitted). As the court below noted (Pet. App. A 5), the petitioners' proferred testimony, even if credited, would not have proved Seebauer to be an addict. Nor was he a paid government informer or under indictment at the time he testified.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1975.